In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 26

JOHN BURRELL GARNER, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, RESPONDENT

No. 27

MARY BRISCOE, ET AL., PETITIONERS

v.

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No. 28

JANNETTE HOSTON, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, RESPONDENT

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Brief on Behalf of Respondent State of Louisiana

SARGENT PITCHER, JR.
District Attorney
19th Judicial District
Baton Rouge, Louisiana

JOHN F. WARD, JR.
Assistant District Attorney
19th Judicial District
Baton Rouge, Louisiana

JACK P. F. GREMILLION
Attorney General
State of Louisiana
Baton Rouge, Louisiana

N. CLEBURN DALTON
Assistant Attorney General
State of Louisiana
Baton Rouge, Louisiana
Attorneys for Respondent

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STATEMENT OF THE CASE

On March 30, 1960, these defendants and/or others similarly situated picketed several business establishments in Baton Rouge in protesting the segregation customs of the owners of those stores. Thereafter, on that same day, these defendants and/or others similarly situated marched, in a crowd,

down the main street of Baton Rouge in a "march on the State Capitol" for the sole purpose of engaging in a demonstration protesting the segregration customs of the people of the State of Louisiana. These demonstrations, although protected by the police department of the City of Baton Rouge, were witnessed by a great number of citizens of the City of Baton Rouge. Tension between the two races was high.

In the few weeks, and months, immediately preceding March 28, and March 29, 1960, members of the Negro race in other cities throughout the south had engaged in "sit-in demonstrations". In almost every instance of the staging of a militant "sit-in demonstration" violence had occurred with resulting fist fights between members of the two races. Every citizen of Baton Rouge, including these defendants, were aware of these "sit-ins" and the violence which they had caused.

Every responsible citizen of the City of Baton Rouge was concerned over the possibility of violence, blood shed, and mob violence facing our normally law abiding and peaceful community.

On the evening of March 29, 1960, when it was first learned that the "march on the capitol" demonstration was to take place the next morning, responsible public officials advised law enforcement officers not to interfere with these people if they commenced a demonstration on the public streets of the City of Baton Rouge either by picketing business establish-

ments or by marching on the capitol and whether carrying signs or not, as long as they did not block traffic or prevent the normal use of the streets by other persons also entitled to their use. They were further instructed *to not let* any other person interfere with these demonstrators. Consequently, on March 30, 1960, the demonstrators picketed and demonstrated the entire length of the main business street of the City of Baton Rouge, ending their demonstration in a mass meeting on the steps of the State Capitol, with their right to lawfully demonstrate in this manner at all times protected by local law enforcement officials.

But, was this lawful manner of demonstrating and expressing themselves sufficient?

No, the right to freely express themselves in a place where they had a right to do so was not sufficient for these defendants. On March 28 and 29, 1960, these defendants had entered the respective private business establishments herein involved to force their demonstrations on private individuals on their own private property. (R. Hoston 7; R. Garner 6; R. Briscoe 8)

In each of these cases, the defendants were told in clear unmistakeable language, which could have no other meaning under the circumstances, to cease and desist from this unlawful activity, that is, engaging in an "activity . . . to protest segregation" and, "in protest of the segregation laws of the State of Louisiana, . . . 'sit-in' a cafe counter seat . . . " (R.

Hoston 7; R. Garner 6; R. Briscoe 8) These defendants were all told, in language unmistakably clear under the circumstances, that they would not be served food or drink at the counter at which they were seated but that they would be served at another counter designated by the owner. In other words, they were told in clear unmistakeable language that if they were in the store for normal business purposes they could carry out those purposes by going to the counter pointed out to them by the manager or waitress involved in each particular instance, but that they would not be served while engaging in such demonstration in the particular area of the store at which they were. They refused to leave the area at which they would not be served and refused to go to the area pointed out to them by the manager or employee who had full legal authority to require them to go to that particular area of the store.

If we examine pages 29 and 30 of the record in the Hoston case, we find the manager of the store testifying that "something unusual happened on March 28"; that he told his waitress to "offer service at the counter across the aisle"; that they were "seated at the counter reserved for white people"; that they were not served there and that they were "advised that we would serve them over there" (other counter); that they did not go over there but "continued to sit"; that he went to the telephone and called the police department because "I feared that some disturbance might occur" . . . because it isn't customary for the two races to sit together and eat together

. . . at Kress' . . . that this was the "custom of the store" and that that custom was prevailing when he got there a year and a half before. And on page 36 of the record you have the law enforcement officers asking them, not once, but twice, to move on, and their refusal to do so, before they were arrested.

In the Garner case, you have the owner of Sitman's Drug Store, Mr. Willis, testifying that he was the sole owner of Sitman's Drug Store and the sole owner of Sitman's Restaurant and Cafe, two separate establishments; that although he served both Negroes and Whites in his drug store, he served only Whites in the cafe as a matter of personal policy and choice to him; that this had always been his policy and choice; that these defendants entered the cafe and seated themselves at the counter and were told by him that they would not be served; but the defendants remained seated; the law enforcement officer asked them to leave and only after they again refused to leave were they arrested. That these defendants knew of the policy of this private businessman on his own private property is made clear by his answer to the question propounded by counsel for defendant on page 32 of the record:

> Q. For what reason did you refuse to serve these defendants?
>
> A. As a matter of policy I have *never* invited colored trade, Negro trade in the restaurant, as a matter of policy. I don't have the facilities. I have facilities for only one race, the White race. (emphasis supplied)

In the Briscoe case, on pages 30 and 31 of the record, the waitress, Miss Fletcher, testified that these defendants came in and sat down at the counter and that she told them they would have to go to the other side to be served. She testified further on page 31 that "they came here and said they wanted something and I told them that they would have to go to the other side to be served, and they just kept sitting there and so we called the police and told them to come get them." She also testified that the police said that "they said they would give them a chance to get up and go or either they would have to go to jail" she also testified as follows:

Q. And you told them you couldn't serve them and asked them to move, is that correct?

A. Yes sir.

Q. And when they refused to move you called the officers?

A. Yes sir.

She also testified when questioned by the Court as follows:

Q. As I recall your direct testimony you stated, and if I am not correct, correct me, that after they ordered the food you told them that you couldn't serve them, that they had to go over to the other side reserved for colored people, is that right?

A. Yes sir, that's right.

Q. Did they go over there?

A. No sir.

Q. Did they refuse to go?

A. Yes sir, they just sat there . . .

Q. Was there a place reserved for colored people in this same building?

A. Yes sir . . .

Q. Was it adequate to serve these people, was it large enough to serve these people?

A. Yes sir.

And again when the police officer was called he testified as follows, as shown at page 35 of the Briscoe record:

Q. Anyway what, if anything, did you do?

A. Well, Inspector Bauer talked to one of the group.

Q. Did you hear what was said?

A. No. And then he talked to them the second time and then he told them that they were under arrest . . .

Q. Did you ask them to move?

A. We did.

Q. You gave them an opportunity to get up and leave?

A. That's right.

Q. And did they?

A. No.

Q. Were they all together?

A. That's right.

And again on page 37 and 38 of the record the officer testified as follows:

Q. "But what I want to clear up, I think it is fairly clear but I want to go over it again, you requested these defendants to leave the counter or the stools that they were sitting on before you arrested them?

A. That's right sir.

Q. And they refused to leave?

A. That's right.

Q. And that's when you made the arrest?

A. That's right.

These defendants were then ultimately found guilty as charged by the Court and ultimately arrived before this Court on Writs of Certiorari.

ARGUMENT

I.

There was and is evidence of conduct which would foreseeably and unreasonably disturb or alarm the public and this Honorable Court should not substitute its judgment for that of the jury, or Trial Court, as to whether such evidence was sufficient to return a verdict of guilty rather than not guilty.

In our Brief in Opposition to the Application for Writs of Certiorari which was previously filed, we discussed the various legal questions and defenses raised by these defendants from the standpoint of the applicable case law. In the interest of space and time we would here re-adopt by reference each and

every argument submitted in our Brief in Opposition. In addition, the concluding portion of this brief will discuss, from the standpoint of applicable case law, the additional points and re-worded arguments submitted in defendants' brief and the various amicus curiae briefs filed in their behalf by the Committee on the Bill of Rights of the Association of the Bar of the City of New York and by the United States Government.

At this point, respondent would attempt to put these cases in their proper perspective from a factual point of view. By argument and language, counsel for defendants have attempted to turn this case into a great segregation Civil Rights matter when in fact it really is not. **THE ONLY REAL ISSUE IN THESE THREE CASES IS WHETHER OR NOT A NORMALLY PEACEFUL AND LAW ABIDING COMMUNITY FACING AN EXPLOSIVE SITUATION IN WHICH RACIAL TENSIONS ARE AT AN ALL TIME HIGH, CAN PRESERVE THE PEACE AND ORDER OF THE COMMUNITY BY HAVING ITS LAW ENFORCEMENT OFFICERS ORDER PERSONS CREATING THE EXPLOSIVE SITUATION TO CEASE AND DESIST FROM SUCH ACTION AND ARREST THEM IF THEY REFUSE TO DO SO.**

To put these cases in their proper perspective they must be viewed in the true light of the circumstances surrounding them. Throughout the last part

of 1959 and the early part of 1960, immediately preceding these demonstrations, the leaders of the Negro movement to do away with all segregation, in the nation, whether public or private, abandoned their previous legal mode of attack to embark upon a militant campaign throughout the South to invade private property and harass the proprietors of private business establishments into de-segregating their facilities whether they wanted to or not. These "sit-in demonstrations" occurred in major cities throughout the South. In almost every instance where local law enforcement authorities did not act quickly, violence, to a greater or lesser degree, occurred. A rather complete history of this militant campaign is given in an article in the *1960 Volume of the Duke Law Journal, No. 3*, from which we will trace their history.

"On February 1, 1960, four Negro students at North Carolina A & T College in Greensboro, North Carolina, decided to do something about this alleged unequal treatment. They went to a dime store in an alleged attempt to get coffee. The manager said he could not serve them because of local custom, so they just sat and waited. The only trouble that first day came from the Negro help who came out of the kitchen to tell the boys, now known on their campus as the "Four Freshmen", that they were doing a bad thing. Other students from the college were shopping in the store at the time and when the Four Freshmen returned to the campus 20 students volunteered to join them for the next afternoon. "Ground rules were drawn by the expanded group. . . . Again, Tues-

day they were refused service. They just sat. On Wednesday and Thursday, they returned, in greater strength each time. The A & T students were joined by many students from the Negro Bennett College and also by a few students from the Women's College of the University of North Carolina, both located in Greensboro. By Friday, white teenagers had begun heckling the demonstrators. On Saturday the Woolworth store was jammed with Negroes and Whites. The Negroes mostly sat, while the white boys waved Confederate flags chanted and cursed. Around mid-afternoon the management received a bomb threat, and the police emptied the store. When the store opened Monday, the lunch counters were closed. Dr. Gordon Blackwell, Chancellor of the Women's College, proposed a "truce period" which was accepted to work things out in a less inflamatory atmosphere. Thus ended temporarily the Greensboro demonstrations; but by that time, Negro students were demonstrating in Winston-Salem, in Durham, in Charlotte and the other principal North Carolina cities. *The demonstration in its origin was student inspired and directed. Subsequently, organizations such as the National Student Association. The Congress of Racial Equality, and the National Association for Advancement of Colored People offered their guidance and sponsorship.* In some instances, the help of these organizations was accepted; in other instances, the students desired to go it alone." *Daniel H. Pollitt, Dime Store Demonstrations; Events and Legal Problems of First Sixty Days; Duke Law Journal No. 3, Volume 1960.* This

was only the beginning. And yet there was violence on the very first attempt of these people to invade the private property of others. As the movement increased and became more militant, so correspondingly did the violence increase.

Continuing with Dr. Pollitt's rather thorough chronological exposition of this militant campaign, we note the following at page 319:

> ". . . the demonstrations moved Northward into Virginia and West Virginia; South into South Carolina, Georgia and Florida; Kentucky, Alabama, Louisiana, Arkansas and Texas. Pickets even appeared before those stores in restaurants in Ohio which violated the state eating accommodation laws by denying service to Negroes. The Raleigh News commented that with the arrest of demonstrators in that city, 'the picket line now extends from the dime stores to the United States Supreme Court and beyond to national and world opinion' ".

It should be noted here that though the above quotations referred to picket lines that such is not the situation in the present cases. In fact the right of these persons, and those similarly situated, to otherwise freely express themselves in a place where they had a right to be was affirmatively maintained by the law enforcement officials of the City of Baton Rouge on the day immediately following their invasion of private property. Dr. Pollitt then goes on to cite the extremely wide press coverage given these demonstrations including Eastern Europe and Russia. He mentions

the many nationally known figures who spoke out in support of such demonstrations and whose remarks was given widespread newspaper coverage such as the Rev. Dr. Billy Graham, Mrs. Franklin Roosevelt, United Auto Workers President, Walter Reuther, Florida's Governor Leroy Collins, and various church and university organizations. The comments and publicity which followed these demonstrations was widely publicized throughout the South and increased racial tensions in each and every community in the South.

To briefly follow the route of these militant, well organized demonstrations, State by State, as they swept across the South, we again quote from Dr. Pollitt's article.

ALABAMA

> "The demonstrations reached Alabama on February 25, when 35 Negro students from Alabama asked for service in the Montgomery County Courthouse Snack Shop.... On February 27, a Negro woman was attacked by one of the group of 25 whites who patrolled the streets carrying miniature baseball bats inside paper-bags. . . . On March 1, a thousand Negro students sang the National Anthem on the Capitol steps, . . . On March 2, nine Negro students were ordered expelled for taking part in a demonstration, . . . On Sunday March 6, approximately 800 Negroes left their churches for a demonstration prayer meeting at the State Capitol grounds. A jeering mob of whites charged the marchers, and a riot was narrowly averted

when the police separated the two groups, and mounted deputies and fire trucks moved in to prevent further violence. *Pollitt, Duke Law Journal, No. 3, Volume 1960, page 323 and 324.*"

ARKANSAS

"Arkansas joined the list of Southern states hit by demonstrations on March 10, when about 45 students from Philander Smith College entered a Little Rock variety store and sat down at a white lunch counter. The incident ended without violence when Police Chief Gene Smith recommended closing the counter." (Note: *No violence but the proprietor had to give up his rights.) Pollitt, page 325.*

FLORIDA

"The demonstrations began in this state on February 26, with a sit-in in Tallahassee. . . . Ten days later, forty Negro youths staged a sit-down protest at a Tampa Woolworth lunch counter. The counter was closed without incident." (*Note again the proprietor giving up his rights).* . . . "On March 4, eight ministers tried to enter a lunchroom in Miami's Burdine's Department Store, but were blocked by store employees. A cross was burned in front of a Negro home in Pensacola. . . . On March 12, demonstrations reached Jacksonville. Eight Negroes sat down at the lunch counter of a Kress' Dime Store. The counter was closed." (*Again the proprietor gave up his right to conduct his normal business).* . . . "On the same day, there was near violence in Tallahassee. A group of Negro and white demonstrators at a Woolworth store were arrested, replaced by another group that was arrested, and

by a third group that was arrested," *(Notice the similarity to a military battle, one assault wave after another)* . . . "Shortly after noon, a crowd of about 125 Negroes gathered at a park across the street from the police station and started down the block toward the Woolworth store. Half way there they were met by a group of white men, turned and started back to their campus, while the whites followed with taunts and jeers." *(Near violence)* . . . "On March 17, a group of eight students entered the Woolworth store in St. Augustine, the counter was closed, and when the Negroes left, they were attacked by a group of white men. Police called a cab to take the Negroes away, and the Chief of Police, armed with tear gas, ordered the crowd to disperse." *(Violence and tear gas, armed police) Pollitt, Duke Law Journal, Vol. 1960, pages 325 and 326.*

GEORGIA

". . . On March 10, seven Negroes took seats in a white section of a municipal auditorium during a stage show. There was a brief verbal clash that ended when police designated the occupied section Negro. On March 15, approximately 200 students in Atlanta staged simultaneous sit-ins at noon time at the lunchrooms of the State Capitol, the Courthouse, the City Hall, the bus stations, the railway station, two office buildings housing Federal offices, and a variety store." *(Such an all out assault could not have been carried on without a complete and effective organization almost military in its nature.)* . . . "On March 16, there was a "sit-in" in Savannah, and on March 17, following a big St. Patrick's Day parade, there were scattered fist fights and rock

throwing between groups of whites and Negroes." *(Violence once again)*

NORTH CAROLINA

As North Carolina has been covered in our initial discussion we will not go into it further at this point.

SOUTH CAROLINA

"In this state the demonstrations began on February 23 in the City of Rockhill when 100 Negro students from Friendship College staged a sit-in in two variety stores.... On March 3, approximately 200 Negro students marched around in the Columbia downtown area for nearly two hours. They were heckled by white youths and left at the request of the city manager who wanted to avoid *"an explosive situation"* . . . On March 15, approximately 1,000 demonstrators from Chaflin and South Carolina State Colleges converged at noon in Downtown Orangeburg to protest lunch counter segregation. The police met them with tear gas and fire hoses." (Emphasis added). *Pollitt p 331.*

TENNESSEE

"Chattanooga was the scene of the first Tennessee demonstration, when Negro high school students staged a sit-in in the Kress store. *Rioting broke out* when whites, mostly students, began throwing flower pots, dishes, bric-a-brac, and other merchandise in the store. One white youth grabbed a bull whip from the store stock and used it on a Negro. The Negroes retreated through the streets to a Negro section of the city, *with bricks and other objects being hurled*

by both sides. After the fighting had subsided, white youths walked through the aisles of the Kress and other stores, jeering at Negro customers and frightening many into leaving. . . . Seven whites were arrested, the police concentrating on the leadership." *(Notice again that the arrests for disturbing the peace or causing the violence are indiscriminate as to color).* . . . "The demonstrations then spread to Nashville. A white youth was sitting with a group of Negroes at a dime store lunch counter when a second white youth walked in, called him a ————, and twisted his collar. The assailant then fled, but returned five minutes later. This time, he grabbed the sitting white youth, threw him on the floor, and kicked him. The police then ordered everybody to leave the counter. Eleven Negroes who refused to comply were arrested." *(It is worth noting here that arrests were made only after violence and requests for everyone to leave and the only persons arrested were those who refused to leave.)* . . . "Two days later, fifty-five more Negro students were arrested, this time for refusing to leave the lunch counter at the Greyhound bus station when the Assistant Fire Chief asked all persons to leave the building while a search for a bomb was made. . . . Two weeks later, shortly after the Nashville bus station served Negroes in the white restaurant, two dynamite caps—but no dynamite—were found in the washroom. *Pollitt, Duke Law Journal, Vol. 1960, No. 3, pages 332-334.*" (Emphasis added)

TEXAS

"The demonstrations in Texas resulted in extremes—either of violence or of peaceful settle-

ment. The sit-ins began in Houston, mostly by Negro students from Texas Southern University, with immediate repercussions. A Negro drug-store porter was slashed by a white youth with a knife, and three masked white men seized another Negro, flogged him with a chain, carved the insignia of the Ku Klux Klan on his chest and stomach, and hanged him by his knees in an oak tree. In the east Texas city of Marshall, demonstrations began on March 27, . . . On March 30, . . . about 200 Negroes gathered near the courthouse and began to sing "God Bless America" and similar songs. The firemen then arrived and turned powerful streams of water into the crowd. Hoses drenched West Houston Street, which leads to Marshall's two all-Negro colleges . . . In contrast with the situations in Houston and Marshall is that in San Antonio. Through the intervention of the Rev. C. Don Baugh, executive director of the San Antonion Council of Churches, downtown dime stores agreed to serve Negroes . . . In Galveston, too, lunch counters were voluntarily integrated and Negroes started eating beside whites without incident." *Pollitt, p. 334-335.*

VIRGINIA

"The demonstrations began in Richmond with a sit-in at the restaurant in Thalhimer's department store. Thirty-three participants were arrested, which prompted a picket line urging a boycott . . . The protest demonstration ran a course similar to that in other states. *Pollitt, Duke Law Journal, 335-336.*

And again to quote Dr. Pollitt at page 336 of his

exposition, " 'the determination that underlines the movement has been demonstrated from Alabama to Virginia' comments the New York Times." "Negroes have risked fines and jail sentences, attacks from angry Whites, and, in at least one case, possible death at the hands of a mob."

The purpose in quoting from Dr. Pollitt's exposition is not to try to assess the blame for any particular incident of violence in any of the communities in which it occurred on either the white race or the colored race in that particular community. The purpose is to show the very thorough campaign that was carried on throughout the Southern states in the brief two months prior to the incident occurring in Baton Rouge, Louisiana. It is also to point out that where arrests were made by the local law enforcement officers early and quickly, no violence occurred, but where local law enforcement officers stood by and allowed the demonstrations on private property to continue, violence eventually occurred. Another purpose in quoting these incidents is to show that the right of these people to freely express themselves by picketing, marching through the public streets, marching on the courthouse, etc., *freedom of expression where they had a right to freely express themselves*, was in most cases not only not interfered with, but was protected. Such was the case in Baton Rouge as shown by the statement of the case.

Again, to show the militant nature and organization of these sit-in demonstrations, we would quote at some length from the article entitled "The Strategy

of a Sit-in" by C. Eric Lincoln in the *January 5, 1961, issue, Volume 24 No. 1 of the Reporter* magazine, pages 20-23. Although the writer of the article obviously supports these sit-in movements, his description of such movement is certainly well worth noting. For example, his article is broken into sections as follows: (1), First Skirmishes; (2), Logistics and Deployment; (3), All Right Lets Go; and (4), Allies and Morale. We will quote at some length to give an idea of the development of the sit-ins campaign as conducted in Atlanta.

> ". . . "What came to be referred to as the 'fall campaign' got under way immediately after the re-opening of the colleges in mid-September. This time the main sit-in targets were in the heart of Atlanta's shopping district. Because of its size and its alleged 'leadership' in the maintenance of segregated facilities, Rich's became once again the prime objective . . . By Friday, October 21, hundreds of students had launched attacks in *co-ordinated waves.* Service to *anyone* at eating facilities in the stores involved had all but ended, and sixty-one students, one white heckler, and Dr. Martin Luther King were all in jail. Negotiations between the merchants and the Students-Adult Liaison Committee were promised on the initiative of the mayor. When the truce ended thirty days later, no progress had been made in settling the impasse, and on November 25, the *all out attack* was resumed. *By mid-December, Christmas buying was down sixteen per cent—almost $10 million below normal.*

Both the Atlanta police and the merchants have been baffled by the students' apparent ability to appear out of nowhere armed with picket signs, and by the high degree of co-ordination with which *simultaneous attacks were mounted* against several stores at once. . . . The secret of their easy mobility lay in the organization the students had perfected in anticipation of an *extended siege.*

Much of the credit for the development of the organizational scheme belongs to _____ who is the recognized leader of the student movement in Atlanta, and his immediate "*general staff*" . . . its *executive officer* has the rather whimsical title of "le Commandante". The headquarters of the movement are in the basement of a church near the University Center, and (le Commandante), arrives there promptly at seven o'clock each morning and goes through a stack of neatly typed reports covering the previous day's *operations.* On the basis of these reports, the *strategy* for the day is planned. . . . Meanwhile, *the Commandante and his staff* are in conference. . . . *Deputy Chief of Operations* . . . will have arrived, as will a fellow student, . . . who serves as *field commander* for the committee. . . . Telephoned reports from *Senior Intelligence Officer* . . . (already at his post downtown), will describe the nature of the flow of traffic at each *potential target.* . . . *A large map dividing the downtown district into five areas is invariably consulted and an Area Commander is appointed for each operational district.* Assignments fall into three categories: pickets (called

by the students "picketeers"), sit-ins, and a sort of flying squad called "sit-and-runs." *The objective of the sit-and-runs is simply to close lunch counters by putting in an appearance and requesting service.* . . . By now it is nine or nine-thirty and transportation has arrived. . . . The *Deputy Commander* provides each driver with a *drivers orientation sheet* outlining in detail the route to be followed by each driver, and the places where each of the respective groups of students are to be let out. The *Area Commanders* are given final instructions concerning the *synchronization of the attack*, and the cars move off, following different routes into the city. . . . Meanwhile, *Field Commander* . . . is checking a *communications code* with _____, or one of the five other licensed radio operators who man a *short-wave radio set* up in the church nursery. When this has been attended to, Commander _____ climbs into an ancient automobile equipped with a *short-wave sending and receiving unit* and heads for the downtown shopping district. He is accompanied by _____, whose job it will be to man the *mobile radio unit*. . . .

Reports from the *Field and Area Commanders* begin to trickle in by radio and telephone. As the lunch hour nears, the volume of reports will increase to one every two or three minutes. . . . Here are two actual reports taken from the files and approved for publication by the *Security Officer:*

11-26-60 11:05 A.M.

From: Captain _____

To: le Commandante

Lunch counters at Rich's closed. Proceeded

> to alternative objective. Counters at Woolworth's also closed. Back to Rich's for picket duty. Ku Klux Klan circling Rich's in nightgowns and dunce caps. "Looking good!"
>
> (Emphasis throughout added)

The above quoted portions from this article should be sufficient to show that regardless of the statements of the leaders of some of these and other movements about "passive resistance" etc., these movements are anything but passive. They are well organized and well supported financially. No reasonable man can read the examples cited by Dr. Pollitt, the militant campaign described by Mr. Lincoln, and know of the high degree of racial tension which exists throughout the South, without coming to the conclusion that it is entirely foreseeable that these demonstrations can disturb and alarm the public and result in violence. Must the individual communities throughout the South, and for that matter, the nation, wait until violence occurs and mobs run rampant before taking action? Or may they profit by the experience of other cities and protect the rights of these people when they are demonstrating where they have a right to demonstrate and order them to cease and desist when they are demonstrating on private property where they have no right to do so?

Counsel for defendants and the Federal Government, in argument in their brief, object to the City of Baton Rouge foreseeing violence in these demonstrations. But how can you read the history of these demonstrations, the history of this militant movement

from the time it began some short two months before these cases arose, and thereafter, without foreseeing violence as a result thereof. There is only one possible way to eliminate the probability of violence from these demonstrations. And that is for the private property owner to completely relinquish his right to refuse admission to his property to other people for whatever reason he might have, and particularly for an unwanted demonstration. In the absence of his doing so, there are only three possible results, (1), that these people continue to occupy seats which would normally be used by other patrons of his business, thereby interfering with his business and a transgression against his own civil rights; (2), violence, resulting from the proprietor attempting to forceably evict these people or other people attempting to use the seats which these people have taken and which, according to the proprietor, his other patrons have a right to use; or (3), their being forceably removed and/or arrested by local law enforcement authorities in a proper effort to protect the rights of its citizens and avoid violence and disorder in our community.

And furthermore, if violence is not foreseeable as a result of these "sit-ins" "freedom rides", etc., why does the Federal Government send hundreds of Federal Marshalls into Montgomery, Alabama, Jackson, Mississippi, and New Orleans, Louisiana? The Government took the position that discrimination in bus stations and railway stations in Montgomery, Alabama, was unlawful and it therefore called upon the law enforcement officials of Montgomery, Ala-

bama, to arrest any one who interfered with the exercise of the right of the defendant to go where he chose in such interstate facility. And when the government felt that the Montgomery law enforcement officials could not cope with the situation, and foresaw possible violence as a result thereof, the government sent several hundred Federal Marshals to Montgomery for the express purpose of preventing violence. Yet, in the instant three cases, the government cites no authority, no law, no constitutional provisions, and no case that says these defendants have a right to demonstrate on private property or have a right to remain on private property ofter being told they would not be served and asked to leave. In other words, the government felt a responsibility to protect the rights of these Negro people under the Interstate Commerce Act, and to prevent violence, and it moved immediately with its law enforcement officials to do so. Why does it not feel the same responsibility to protect the rights of other citizens or, at least, not oppose the protection of those rights, and the prevention of violence, by the City of Baton Rouge?

So then, we come to Baton Rouge, Louisiana, on the morning of March 28, 1960. For the preceding month and a half the newspapers had been carrying story after story of the sit-in demonstrations and resulting violence in other cities. Headline stories of one group of people violating the property rights of another group of people and being supported therein by outstanding national figures and the Federal

Government. Stories of people refusing to leave another individual's property after having been requested to do so, the type of conduct which is, to the people in Baton Rouge, completely unlawful and a direct affront to their normally law abiding nature. Couple this with already inflamed emotions and high racial tension which has become increasingly worse since 1954. What were responsible citizens and officials charged with the responsibility of preserving peacefulness and law and order in the community to do? Were they to order the proprietors of private businesses to open their doors to these people to permit them to come in even though they did not wish them to do so? Should they have arrested these proprietors if they refused to allow these people to come in? Hardly, because there was no legal authority for them to do so. What then? Must they have waited until violence, fist fights, brick throwing, etc. finally commenced? Should they have waited until the proprietor attempted to forceably remove these people with its resulting violence and possible damage to his store? And if so, who then should they have arrested for disturbing the peace? According to the defendants, it would be the proprietor. But what has the proprietor done, except to exercise his own right to refuse admission and to eject those who refuse to leave when requested to do so? I cannot believe that it is the intention of this Court to tell individual communities throughout the nation that you may not take quick action to prevent violence and disorder in your community by quickly arresting persons engaging in a demonstration on

private property against the owner's wishes, but must instead wait until violence and disorder actually occur. Such a concept turns our civilization back, not hundreds, but thousands, of years.

It should be noted at this point that although the stated respondent in this matter is the State of Louisiana, the State is not the real party at interest. The real party at interest in all three of these cases is the City of Baton Rouge, the community of Baton Rouge. Disorderly conduct or mob rioting in the City of Baton Rouge affects no one else in the State of Louisiana. The only people concerned here with keeping the peace, people who would desire to carry on their normal daily activities without being subjected to possible violence and disruption of those activities, are the people living in the local community known as the City of Baton Rouge. What is a local community, whether it be located in the State of Louisiana, Idaho, New York, California or Nevada, to do in these circumstances? A local community in these circumstances has, actually, only three choices: (1), it may sit idly by and allow these persons to possess a portion of the property of another of its citizens, for an unwanted demonstration, against his wishes, until that citizen relinquishes his own rights; (2), it may sit idly by until that private citizen attempts to forceably eject these persons with the resulting violence, and probable spreading of such violence and disorder to its other innocent citizens; or (3), it may act quickly, for the benefit of all of its citizens, to prevent and terminate such illegal demonstrations, before violence and

disorder occur, by ordering these persons to leave the premises and cease and desist from such illegal demonstrations and then by arresting such persons if they refuse to leave at the request of law enforcement officials. It seems obvious to the writer that under the circumstances and conditions so readily apparent in these cases, so readily apparent from the record itself, that the proper course, the more reasonable course, the more prudent course, is to act quickly and preserve the peace, order, and tranquility of the community.

The defendants and the government, by taking isolated answers from the testimony reflected in the record in these three cases, make much of the contention that these defendants were following a normal every day course of conduct in seeking service and that there is *no* evidence in the record to justify a conviction. However, we respectfully submit, that it is impossible to read *all* of the testimony of the proprietors, managers and employees of the three places of business involved and the *sworn* motions to quash in which the defendants testify and admit that they were "engaged in an activity to protest segregation" and that they did "in protest of the segregation laws of the state of Louisiana, . . . on the 29th day of March, 1960, 'sit-in' a cafe counter seat . . . ", without coming to the inescapable conclusion that there is ample evidence in the record that these defendants were engaged in participating in an unwanted anl illegal demonstration on private property against the wishes of the owner and that after

being requested to remove themselves and cease and desist with such demonstration, both by the owner, manager or employee, and police officers, refused to honor such request or obey such direction from the local law enforcement authorities. And, as admitted by the government on page 18 of its brief, "the decision *(Thompson vs. City of Louisville, 362 U.S. 199,* and others cited) does not mean that a Federal Court may reverse a state conviction merely because, upon re-evaluating the record, it finds that the evidence is insufficient to support the conviction." We respectfully submit, that there was evidence in the records to support these convictions and that, therefore, this Honorable Court should not substitute its judgment for that of the jury or trial court, as the case may be, as to whether or not the verdict should have been guilty or not guilty.

Now, with the background of this militant campaign before us, let us look at the situation in the one community involved, Baton Rouge, Louisiana, during these three days of demonstrations. Of course, the Baton Rouge newspapers had been, for the past several weeks, printing the same stories which appear in Dr. Pollitt's article. The Baton Rouge morning paper, the Morning Advocate, of Sunday, March 27, 1960, carried the following headline and story:

> "NEGRO PROTESTS SPREAD — PICKETING, PARADES, AND RALLIES STAGED OVER WIDE AREAS."

"Mass anti-segregation demonstrations in support of Negro lunch counter sit-downs in the South spread across the country Saturday . . .

"Newport News, Virginia, Focal point of the nation-wide demonstration movement which student leaders called *'operation 26'* . . . Sit-down protests occurred in many cities, among them Charleston, West Virginia, and there was picketing in Savannah and Atlanta, Georgia — In Atlanta, a spokesman for CORE (Congress of Racial Equality) said 25,000 leaflets were being distributed urging a boycott of stores with segregation policies . . . More than five hundred persons belonging to CORE and another interracial group posted picket lines at 20 variety stores in the downtown Los Angeles area. *None of the stores have a segregation policy.* They were the latest sympathy protest in the Los Angeles area . . ." (Emphasis added)

On Monday morning March 28, 1960, the Morning Advocate carried the headlines "CROSSES BURNED IN DEEP SOUTH STATES; STUDENTS STAGE DESEGREGATION DEMONSTRATIONS" In the Baton Rouge evening paper, The State Times, of March 28, 1960, the headlines and story were as follows:

"CROSS BURNINGS ARE REPORTED IN SEVERAL STATES OVER THE WEEK END.

"The ninth week of anti-segregation demonstrations began in the South today following a week-end of cross burnings.

> Hooded klansmen burned crosses in Alabama, Georgia, Florida and South Carolina as students in the North and west joined Negroes in their campaign against separate lunch counter facilities . . . Both white and Negro students supporting the campaign of Southern Negroes picketed stores in State College, Pennsylvania, Iowa City, Iowa, Los Angeles, California and Albany, New York. . . . *A special Mayor's committee said the Nashville incident wiped out three weeks of work to ease racial tensions . . .*
>
> (Emphasis added)

On Tuesday, March 29, 1960, the Morning Advocate carried the following headlines on opposite sides of the page:

> "NEGRO STUDENTS ARRESTED HERE AFTER SIT-DOWNS; GROUP OF SEVEN JAILED, LATER BONDED; SOUTHERN (SOUTHERN UNIVERSITY) RALLY THREATENS BOYCOTT"
>
> "CHURCHES BURNED AS AFRICAN AUTHORITIES BATTLE NEGRO MOBS—DEMONSTRATORS FIGHT POLICE, OTHER NEGROES.
>
> "Great fires set by mobs raged Northeast of Cape Town Monday night as white police battle with Negroes and militant Negroes fought both police and other Negros. It was the fiery, violent climax to South Africa's "day of mourning".

Again, on Tuesday afternoon, March 29, 1960, the Baton Rouge State Times carried the following headline and story:

"TWO ARRESTED IN SECOND 'SIT-DOWN' INCIDENT."

Negro students from Southern University here today continued their sit-down lunch counter demonstrations with an invasion of Sitman's Drug Store at Main and North Third Street . . ."

Then, on Wednesday morning, March 30 of 1960, the Baton Rouge Morning Advocate carried the following headline and sub-headline:

"THIRD STREET BOYCOTT BY NEGROES URGED AFTER NEW SIT-DOWN CASE. SEVEN MORE STUDENTS ARRESTED HERE; REPORT CROSS BURNING—NEGRO MINISTER ASKS CONGREGATION TO CEASE SHOPPING AT EASTER SEASON"

And on Wednesday afternoon, March 30, the Baton Rouge States Times carried the following headlines and story:

"NEGROES MARCH DOWNTOWN; GRAND JURY BEGINS INQUIRY—TWO THOUSAND DESCEND IN MASSE ON THIRD STREET; SOUTHERN UNIVERSITY HEAD PROMISES POSITIVE ACTION AGAINST SOME STUDENTS"

"Some two thousand Southern University Students marched on downtown Baton Rouge and the State Capitol at 9 A.M. today, and nearly five hours later the Parish Grand Jury began a full scale investigation of a three day series of

Negro demonstrations here . . . and *Mayor-President Jack Christian asked citizens of the Parish to keep away from heavily patrolled areas and urged people to 'let your law enforcement agencies take care of this situation'* . . . The students, orderly, quiet and obviously well-briefed as to behavior marched on the State Capitol and after picketing briefly the Greyhound Bus station, McCrory's, S. H. Kress & Co. and Sitman's Drug Store at Third and Main . . . Demonstrations reached a peak today after lunch counter sit-downs Monday and Tuesday . . .

Dr. Clark (Dr. Felton Clark, President of Southern University) said in a prepared statement; *"We have consistently advised students against the course of action which a segment of them are now taking . . .'* (Emphasis added)

Mayor-President Christian said in a statement; . . . If the people will refrain from coming to the areas patrolled, it will be much easier to handle the flow of traffic and will keep the congestion downtown to a minimum . . . *The thing that bothers us is that someone may do something violent which of course will make it very difficult for our present forces to handle the situation . . . We are doing our best to prevent any acts of violence or injury to anyone or to anyone's property and so far we have succeeded. . .*

In the midst of the morning demonstration, City Police received a report of a bomb in Sitman's Drug Store, scene of a Negro lunch counter sit-down strike yesterday. The store was closed by police and sidewalks made off limits to pedestrians while a thorough search was made." (Emphasis added)

Finally, the Morning Advocate of Thursday March 31, 1961, at a time when, as far as local authorities knew, these demonstrations were scheduled to continue and to spread, carried the following headlines and stories:

> "SUSPENSION FOLLOWS BATON ROUGE DEMONSTRATIONS; THE THIRD DAY OF UNPRECEDENTED DEMONSTRATIONS AGAINST SEGREGATION BY NEGRO STUDENTS HERE WEDNESDAY . . . "

On the opposite side of the page there was the following headline:

> "HOSES BREAK UP TEXAS NEGRO DEMONSTRATION."
>
> "Firemen turned streams of water into groups of young Negroes late Wednesday to calm a demonstration lunch counter incident."

Is it possible to read the history of these "sit-in" demonstrations and the content of news which the general public in Baton Rouge was receiving prior to and at the time of these incidents, as shown by the preceding headlines and stories, and say that there was not sufficient probability of violence or disorder to justify the stopping of these demonstrations? Neither the city of Baton Rouge, nor the State of Louisiana for that matter, was attempting to persecute anyone, or deprive any citizen of any of their rights, in the action that they took in the midst of these sit-in demonstrations which resulted in the arrests in the present cases. To the contrary, it seems to us to be obvious that all the law enforcement officials of the

City of Baton Rouge did, was to take only such action as was absolutely necessary to preserve order, peace and tranquility in our community, to avoid violence, disorder and mob rioting and preserve the stable, moderate, law abiding community which we have. *That they were not trying to deprive anyone, much less these defendants and others similarly situated, of any of their constitutional rights, appears obvious from the fact that not only did the law enforcement officials not interfere with these persons when they were picketing or when they were demonstrating on the public streets and marching on the State Capitol, they actually enforced and protected their right to do so. Only when they moved their demonstration to a place where they had no right to be for such purpose, did law enforcement officials take any action.* Furthermore, there can be no doubt that a probability of violence existed and that these defendants, being reasonable people, should have known, and in fact did know, of such probability. The statement by the Mayor of Baton Rouge indicates the concern with which public officials viewed these demonstrations when he said "we are doing our best to prevent any accident, violence or injury to anyone or anyone's property and so far we have succeeded".

In the Baton Rouge Morning Advocate of March 31, 1961, the publishers set forth a front page editorial (which in itself indicates the concern with which responsible citizens viewed these demonstrations) and which we believe to be worthwhile to quote from at length at this point.

"LET'S KEEP OUR HEADS"

"The good relationship between the races in Baton Rouge is threatened by the utterance of the ugly word 'boycott' a development which we are sure most leaders in both races in the community regret. This is an unnecessary and unwise threat aimed at people . . . .

It is unfortunate that the excellent relationships which have prevailed should be interrupted even slightly, as they have been, by a spread through this city of the 'sit-in' demonstrations conducted by Negro college students with much excitement but little lasting effect in a number of other communities. . . .

These are times that require understanding, good will, and patience, regardless of how hard these things may sometimes come to some among us. The recognition and acceptance that really count cannot be hastened or ever won by *any action that creates alarm, destroys good will* or alienates the different groups in the community. Anyone on either side of such a controversy who threatens or hints at mob action automatically destroys the very thing for which he claims to be struggling. Civilized people of all races are revolted and offended by the *thought of violence and disorder.*

Radicals on one side must realize that no changes can be brought about by immature *demonstrations and disorders.* Radicals on the other side must realize that changes cannot be prevented by *threat or intimidation.* The great majority of the people, who want none of all this, will condemn both. Our society may have its imperfec-

> tions, as do all things of human design. But this is not the way improvements will be brought about. Time and orderly evolution can bring progress. *Force, can bring none.*" (Emphasis added)

As will be seen from the foregoing, no matter how many isolated sentences are taken from the testimony in these three cases, and regardless of the argument that these defendants were in these establishments for normal business purposes, it is abundantly clear that these defendants were engaged in a demonstration to protest the segregation customs of the people of the State of Louisiana, and invaded private property for the sole purpose of carrying on their organized demonstration. It is also abundantly clear that the carrying on of such demonstrations on private property against the owner's wishes was the doing of an act in such a manner as would foreseeably and unreasonably disturb or alarm the public.

The government contends in its brief that the Trial Court must ignore the circumstances surrounding these cases and the fact that they were a part of a well organized militant movement or so called passive harassment; and that he must ignore the *fact* that such conduct is likely to "disturb the sensibilities" and "arouse resentment" among other members of the public and the owner, and their agents and employees, of the business establishments invaded. They refer to such as taking "judicial notice" and then cite the cases of *Ohio Bell Telephone Company v. Public Utility Commission*, 301 U.S. 292; *United States v. Shaughnessy*, 234 Fed. 2nd 715; and *McCormick evi-*

dence Section 324 (1954) for the proposition that Courts can take judicial notice, especially in criminal cases, only of obvious and incontrovertible facts. (Government Brief pages 25 and 26) However, Louisiana's Courts are specifically authorized by state statute to take judicial notice of that which the trial Judge in these three cases took judicial notice of, if the taking of judicial notice was necessary at all, that is, racial conditions prevailing in the state. LRS 15:422, originally adopted as Act No. 2, Section 1, of 1928, provides in part as follows:

> "Section 422. Judicial notice of specific matter.
>
> Judicial cognizance is taken of the following matters: One, . . . (6) the laws of nature, the measure of time, the facts disclosed by the calendar, the facts of geography, the geographical and political division of the world, the facts of history and the political, *social and racial conditions prevailing in this state;* (emphasis supplied)

Taking judicial notice of racial conditions prevailing in the State has been sustained by the Louisiana Supreme Court and is particularly worth noting in the case of *State v. Bessa et al* 115 La. 259, 38 So. 985 (1905). In this case the two defendants, Negroes, were convicted of striking a white man with intent to murder and were sentenced to seven years in the penitentiary. The defendants reserved a Bill of Exceptions to a remark made by the District Attorney in the peroration of his opening address to the jury. According to the defense the prosecuting attorney had

said to the jury that the victim (a white man) was to the jurors trying the case "a creole fellow brother in blood". According to the District Attorney he had said to the jury "a fellow brother in blood" had been met by two unknown riders, and assaulted . . . The Trial Judge's statement as to what occurred was as follows: "In his opening address to the jury the District Attorney referred to the prosecuting witness as a "creole fellow in blood" . . ."

The Louisiana Supreme Court ruled as follows on this point:

> "Taking the statement of the Judge, and assuming that the word 'brother' was not used —in other words, assuming that the expression was simply 'fellow in blood' and not 'fellow brother in blood'—the question may be asked: Why did the District Attorney bring up the matter of blood, if not to draw the color line? Here was a jury all white, and two Negroes being tried for striking a white man and nearly killing him. *The Court thinks it knows enough of the situation between the whites and the Negroes in Louisiana to know that the average white man is prone enough to be prejudiced in such a case, without being exhorted thereto by the law officer of the government, and that, such an appeal having been once made, the effect thereof cannot be counteracted by any mere cautionary words of sober reason that may be uttered by the Judge.*"

The Court then reversed the conviction on the basis of the remark made and its having taken judicial notice of racial conditions prevailing in the state. Consequently, we respectfully submit, that if knowledge

of the fact that these sit-in demonstrations are part of a well organized and deliberate movement of demonstration against segregation customs, and knowledge of the tensions existing between the races in Baton Rouge, is the taking of judicial notice, the Trial Court Judge was amply authorized by the law of Louisiana to take such notice.

It is interesting to note, however, that the government then goes on to say (Government Brief, page 26) that, "of course, it is plain that petitioners conduct was likely to disturb the sensibilities of those members of the public who hope for the preservation of racial segregation in restaurants and at lunch counters. It will arouse resentment among the prejudiced. . . ."

I could not agree with the government more that it would so "disturb the sensibilities" and "arouse resentment". And certainly, if such is so "plain," it is just as "plain" that these demonstrations, and this method of protesting segregation customs, could "disturb the sensibilities" and "arouse resentment" among the *unprejudiced, law abiding citizens*, who abhor such an invasion of private property.

II.

The statute under which petitioners were convicted is almost identical to state statutes and municipal ordinances which have been sustained throughout the nation and as applied to these facts and circumstances is not so vague, indefinite and uncertain as

to offend the due process clause of the Fourteenth Amendment.

Defendants further contend, through a rather complicated, almost mathematical-formula-like re-arranging of words, that there is no evidence that defendants committed any acts bringing them within the ambit of LRS 14:103, or that, if there is such evidence, the statute, as applied to the defendants in these cases is so vague and indefinite as to be unconstitutional. Nothing could be farther from the truth. The statute in question is almost identical to statutes and ordinances used in almost every city and every state in the union. Disturbing the peace, order and tranquility of a community can consist of so many different types of acts under so many different kinds of circumstances that to require the state to specifically list and particularize each and every such act, would require an impossibility. A very thorough discussion of this proposition is made by the Appellate Court of Florida in its opinion in the cases of *Steel, et al v. City of Tallahassee* and *Armstrong v. City of Tallahassee No. 671 in which this court refused certiorari at its October term 1960.* _____ U.S. _____. The Court said:

> "the charge and the ordinance seek to deal with conduct similar to that embraced within the common law offenses of 'breach of the peace' and 'disorderly conduct'. . . . The former, breach of peace, is somewhat more restricted and reaches only conduct which disturbs or *tends to disturb* the tranquility of the community. This would ob-

viously include fighting, damaging of property, threatening injury, display of firearms, loud and boisterous language, menacing gestures in an angry manner, excessive noise and other conduct which would put others in terror for their safety or would be destructive to their reasonable comfort. However, such clear rashness is not the extent of the scope of the offense. An act of violence or *an act likely to produce violence* is within its orbit, but also embraced are acts which, *by causing consternation and alarm*, disturb the peace and quiet of the community. Cases cited in *5 Words and Phrases page 767* under topic "Violence". Blackstone is quoted as saying that, besides the actual breach of the peace, *anything that tends to provoke or excite others to break it is an offense of the same denomination.* . . .

The term "peace" used in this connection is said to mean the tranquility enjoyed by the citizens of the municipality or the community where good order reigns among its members. *This is the natural right of all persons in political society and any violation of that right is a breach of the peace. Davis v. Burgess (Michigan)* 20 Northwestern 540; 52 Am. St. Rep. 828. . . .

Testing the conduct of the appellants against these expressions of the elements of the common law offenses above discussed and the words charged in Count 2, it seems clear that such conduct came within the condemnation of the ordinance and within the offense charged in the count. *Though there was no violence actually displayed or patently threatened or noisy tumult made or exhibited, yet the willful, obstinate and persistent refusal to vacate after a representative*

of the owner and management had requested it was an ominous threat to the tranquility of the vicinity. Stubborn determination to hold onto the private property of another until some distasteful policy of another is altered to the transgressor's liking, would be greatly disturbing to the management, other employees of the business and all others who may be present.

In *State v. Cooper, (Minnesota)* 285 Northwest 903, 122 ALR 727, it was held that defendants conduct in carrying a large banner some three feet in length on each side of which was printed the words "Unfair to private chauffeurs and helpers union, Local 912" immediately in front of a private home in an exclusively residential district was held sufficient to sustain a conviction of violation of an ordinance forbidding the making, aiding, countenancing or assisting in making any disturbance or improper diversion. . . . In sustaining the conviction the court said:

"Defendants conduct was likely to arouse anger, disturbance or violence. That there was no outburst of violence was not due to his behavior but to the fortunate circumstance that he was arrested and taken away before any trouble broke. The defendants presence at the McMillian home carrying this banner was likely to provoke trouble and breach of peace. . . ." (Emphasis added)

This position is further strongly supported by the case of *People v. Feiner*, (1950) 300 New York 391, 91 Northeastern 2nd 316, conviction affirmed at *340 U.S. 315*. In this case the defendant was convicted

of disorderly conduct under a statute of the State of New York which read in part as follows:

> "Any person who with intent to provoke a breach of the peace, *or whereby a breach of the peace may be occasioned*, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct;
>
> . . . 2. acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;" (Emphasis added)

In this case the defendant was addressing a group of people on the street. (Note here that the defendant was on a public street where he had a right to be). Among other things, the defendant called the Mayor a "champagne sipping bum" and President Truman a bum, referred to the American Legion as Nazi Gestapo Agents, and then said that the 15th Ward was run by corrupt politicians who were operating horse rooms. A nearby police officer, when he figured that the crowd was "getting to the point where they would be unruly" asked the defendant to get down off his box. After the defendant refused three times, the policeman arrested him and he was subsequently charged under the above quoted ordinance. The New York Appellate Court affirmed the defendant's conviction under sub-section 2 of the statute, as quoted above, saying that it was well settled that the judgment of conviction in a case such as this will be affirmed if the evidence establishes a violation of any of the subdivisions of the section. (Here, it was subsection 2 which prohibits "acts in such a manner as to

annoy, disturb, interfere with, etc.") The court also said that the officer was "motivated solely by a proper concern for the preservation of order and the protection of the general welfare in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community." It also said that a clear danger of disorder and violence was threatened and defendant deliberately refused to accede to the reasonable request of the officer. On appeal to the Federal Court on constitutional grounds, the Court said that petitioner was neither arrested nor convicted for the making or content of his speech but rather that it was the reaction which it actually engendered. The Court also said that "*the finding of the State Courts as to the existing situation and the imminence of great disorder coupled with petitioner's deliberate defiance of the police officer convinces us that we should not reverse this conviction in the name of free speech.*"

As further support of the foregoing argument, we would cite 8 *Am. Jur. 834* which says "in general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by *an act or conduct . . . tending to provoke or excite others to break the peace . . .* it may consist of an act of violence or *an act likely to produce violence.* It is not necessary that the peace be actually broken to lay the foundation for a prosecution of this offense. *If what is done is unjustifiable and unlawful,* tending with sufficient directness to break the peace, no more is required."

Furthermore, *American Jurisprudence* states a principle, and cites cases in support thereof, which would seem to specifically cover the case at bar. At page 835 thereof, the following principle is set forth:

> "An act which if committed at a certain place or time would not amount to a breach of the peace may constitute a crime if committed at another time or place and under different circumstances. In other words, whether or not a given act amounts to a breach of the peace can only be determined *in the light of the circumstances attending the act and the time and place of its commission.*"

We would further cite in support hereof the case of *Nash v. United States*, 229 U.S. 373, 33 S. Ct. 780, 57 L.Ed. 1232, dealing with the anti-trust act, an act under which a reasonable person of "common intelligence" would have much more difficulty in determining what was expected of him then under the statute involved here. In that case, this court quoted with approval the statement that *"the criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct"*.

In addition to these defendants engaging in an organized, militant demonstration on private property in an effort to harass the owner thereof into acceding to their wishes, at a time, and in a place and under such circumstances that any reasonable man should have known that violence and disorder were likely to occur, we have the further element of their refusal

to obey the lawful direction of a police officer, which can, in itself, amount to a breach of, or disturbing the peace, order and tranquility of a community. This element of the defendants' conduct relates itself to the duty and responsibility of a police officer in *any community* to act promptly to maintain the peace, order, and tranquility of his community and to prevent violence and disturbances from occurring where possible. As was said in the case of *People v. Nixon*, 161 Northeast 463, at page 466:

> "Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duty they may give reasonable direction."

We would refer the Court also to the cases of *People v. Calpern*, 181NE 572; *Drews, et al, v. State of Maryland*, 167 Atlantic 2nd 341 and *People v. Arko*, 199 NYS 402, in which last case the court said at page 405:

> "The case must present proof of some definite and unmistakeable behavior *which might stir if allowed to go unchecked, the public to anger or invite dispute, or bring about a condition of unrest and create a disturbance.*" (Emphasis added)

There can be no doubt in these cases that there was some definite and unmistakeable behavior (the participation in a well organized demonstration on private property, the refusal to leave, and the refusal to obey the direction of a police officer) which "might stir if allowed to go unchecked, the public

to anger or invite dispute, or bring about a condition of unrest and create a disturbance."

III.

These arrests and convictions do not constitute "state action" so as to bring them with the prohibition of the Fourteenth Amendment against racially discriminatory administration of state laws.

Now let us consider the contention that these arrests and subsequent convictions amount to "state action" to enforce private discrimination which is prohibited by the Fourteenth Amendment to the United States Constitution and the doctrine laid down by this court in the Civil Rights Cases, 109 U.S. 3 and *Shelly v. Kraemer* 334 U.S. 1. As we pointed out in our *Brief in Opposition* the cases relied upon by defendants do not support their argument. In the Civil Rights cases, decided in 1883, and which declared the Civil Rights Act of Congress of March 1, 1875, as unconstitutional in not being authorized by the Thirteenth or Fourteenth Amendment, the majority opinion may be summarized as found on page 14 of the report:

> "In other words, it (the Civil Rights Act) steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society toward each other, and imposes sanction for the enforcement of these rules, without referring in any manner to any supposed action of the state or its authorities."

This rule of law has existed unimpared to this day and is followed in the Shelly case, which set

forth the following proposition which is also still the law:

> "Since the decision of this Court in the Civil Rights cases, 1883, cited above, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct however discriminatory or wrongful.*" (emphasis added)

This principle of law has been consistently followed until the present time and has been recently reiterated in the cases of *Williams v. Howard Johnson Restaurant*, 268 Fed. 2nd 845 and *Slack v. Atlantic White Tower System*, 181 Fed. Supp. 124.

The defendants, and the Government, in an attempt to avoid and get around the language of the above cited cases and the principle of law set forth therein, have come up with the rather ingenious argument, never before urged insofar as we have been able to determine, and citing no authority which actually supports such argument, that the custom and personal choice of association, (and corresponding right of choice not to associate,) of persons living within the physical boundaries of a particular state, become the positive policy of that state simply because the personal policy of the individual person exists and is believed in by a majority of the people of that state. They further urge, and again in order to avoid the very clear principal of law laid down by the above cited cases, that the State of Louisiana, by having

previously enacted school segregation laws and other segregation laws on *other* subjects, has, in effect, deprived its citizens of the right to privately discriminate or, to state it correctly, deprived its citizens of the right to associate, and the corresponding right not to associate, with whomsoever they please for whatever reason they please, that is guaranteed to *them* by the Constitution and the principal of law enunciated by this Court in the above cases.

The only cases cited by the government as authority for its rather ingenious argument are *Burton v. Wilmington Parking Authority* 365 U.S. 715; *Yick Wo v. Hopkins* 118 U.S. 356; *Sunday Lake Iron Co. v. Wakefield* 247 U.S. 350; and the dissenting opinion of Mr. Justice Harlan in *Plessy v. Ferguson* 163 U. S. 537. Although the Burton case does not support this contention, the government quotes at length from the concurring opinion of Mr. Justice Stewart as though that concurring opinion does support their argument. However, a quick reading of the case and the concurring opinion of Mr. Justice Stewart indicates clearly that it does not. This case involved a statute of the State of Delaware which limited the right of a proprietor to select his customers even though the statute is couched in permissive terms. The statute permits the proprietor of a restaurant to refuse to serve persons "whose reception or entertainment by him would be *offensive to the major part of his customers* . . ." Mr. Justice Stewart in his concurring opinion said "there is no suggestion in the

record that the appellant as an individual was such a person". In the cases at bar there is no such statute regulating, in any way, a proprietor's choice of customers, and such proprietor may refuse service or admission to any person he chooses for whatever personal reason *he alone* might have. The *Yick Wo* and *Sunday Lake* cases concern a clearly discriminatory application of a state statute. Here, the statute in question, which does not refer to race in any respect, has been applied uniformly throughout the years to members of all races, creeds or faiths whenever they engaged in unlawful activities which were likely to disrupt the peace, order and tranquility of the community. Although the dissenting opinion of Mr. Justice Harlan in *Plessy v. Ferguson* has never been adopted by this court with respect to this type of case, the quotation therefrom by the Government, with which we do not argue, is not applicable to these cases nor does it support their argument as no civil rights "as guaranteed by the supreme law of the land" are involved. Not only do these defendants not have the right to compel someone else to associate with them, or give them service, or allow them on their property, they further have no right to go upon another individual's property to engage in a demonstration supporting their particular belief no matter what that belief might be.

The defendants, in their brief, submit similar arguments to attempt to bring these arrests and convictions within the ambit of the Fourteenth Amendment prohibition against "state discrimination". In

support thereof they cite the same cases cited in their *Application for Writs*, which cases, we have previously discussed in our *Brief in Opposition*. Here, again defendants rely primarily on the case of *Marsh v. Alabama* 326 U. S. 501, which we again respectfully submit, is inapplicable to the instant cases. Even if these cases are viewed from the standpoint suggested by defendants, with which we disagree, the *Marsh* case can only support facts identical to the facts before the court in that case. This is apparent because the court before upholding the defendant's right to espouse his personal views on what was otherwise private property, *first felt constrained to find that the property involved had become public in nature.* Therefore, the *Marsh* case can not be cited as authority for the defendants' position *until, and unless this court declares, as a matter of law that the property of all persons engaged in every type of business, no matter how large or how small, has become public in nature.*

We can only assume from the Goverment's argument that this rule of law which they urge would only apply in states which have previously adopted segregation laws and would not apply in states which have not had segregation laws.

In other words, this argument, boiled down to its essentials, is apparently this:

> That although a citizen of Montana may privately discriminate and choose with whom he will, or will not, associate, a citizen of the State of Louisiana does not have such right.

and

That although a citizen of Louisiana may not privately discriminate, and associate, or not associate, with whom he chooses while he is within the boundaries of the State of Louisiana, he may do so if he moves to the State of Nebraska.

and

That although a citizen of the State of Nevada may privately discriminate, and associate or not associate, with whom he chooses while he is within the boundaries of the State of Nevada, he cannot do so while he is within the boundaries of the State of Louisiana.

In other words, defendants and the government, would have this court apply Federal law and Constitutional principals to the citizens of some of the states, primarily the Southern states, but not to the citizens of the other States of the Union. Not only is there no authority for such a contention, but such a result would be directly in the teeth of Section 2, Article 4, of the United States Constitution, which provides that:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

IV.

The decision below does not deprive defendants herein of the freedom of speech or of expression contemplated and protected by the First and Fourteenth Amendment to the Constitution of the United States.

Defendants again urge their contention that their

arrest and conviction in these cases deprives them of the right of freedom of speech and expression guaranteed by the First and Fourteenth Amendments to the United States Constitution. This contention, still maintained by defendants, *is an admission in itself that their real purpose in being on the private property of the individual owners was not for normal business reasons but was actually, and in truth, for the purpose of expressing themselves, demonstrating, or, in their own words, engaging in "activity" to "protest segregation", or, to "in protest of the segregation laws of the State of Louisiana, . . . 'sit in' a cafe counter seat . . . "*. (R. Briscoe 8; R. Garner 7, 8; R. Hoston 7). However, in support of this proposition, defendants merely reiterate the cases cited in their *Application for Writs*, and do not cite a single case or other authority which stands for the proposition that any individual has the right to freely express himself on whatever subject he might desire on the private property of other individuals, and over that owner's objection.

Although we have cited cases which clearly stand for the proposition that the right to freedom of speech and expression may be limited in certain times, places, and under certain circumstances, or that "the hours and places of public discussion can be controlled", *Feiner v. New York* 340 U.S. 315; *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 10 ALR 2nd 608; and *Schenck v. United States*, 249 U.S. 47, 63 L. Ed. 470, 39 Sup. Ct. 247, we actually do not need to rely on these cases for defendants contention

to fall. For, defendants have, at no time, cited a single Constitutional provision or case which extends the First Amendment protected right to freely speak or express oneself to the private property of another individual, over his objection. In fact, no clearer refutation of defendants' contention could be had than from reference to the fact that on the third day of these three days of demonstrations, the defendants' right to freedom of speech and expression was not only *not denied them*, but was *actually protected by* local police officers in protecting them, and other members of their race, while picketing, marching the length of the main street of Baton Rouge, and assembling on the steps of the State Capitol, and by preventing other persons, who no doubt objected to defendants' purposes, from interfering therewith.

V.

The facts and circumstances of the Briscoe case do not bring it within the prohibition of the Interstate Commerce Act.

For the first time, throughout the history of these cases, the question is raised by the government's brief, at page 46 thereof, as to whether these arrests and convictions violated section 216 (d) of part two of the Interstate Commerce Act, 49 U.S.C. 316 (d), and then only with respect to the Briscoe case. The portion of the Interstate Commerce Act relied upon by the government, insofar as its application to the Briscoe case is concerned, reads in part as follows:

". . . . it shall be unlawful for any common

carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person. port, gateway, localty, region, district, territory, *or description of traffic*, in any respect whatsoever; or to subject any particular person, fort, gateway, locality, region, district, territory, *or description of traffic* to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; . . . ." (emphasis added)

It seems plainly obvious from reading the statute cited that it does not apply to the facts in the Briscoe case. In the first place, there is nothing in the quoted act which gives any person the right to engage in a demonstration on the property of another, including an interstate commerce carrier. These defendants, just like the defendants in the other cases, were engaged in an unlawful demonstration on private property which demonstration was likely to disturb the peace, order, and tranquility of the community; they were asked to leave and refused; police officers, in carrying out their duty and responsibility in maintaining the peace and order of the community requested the defendants to leave and they again refused; then and only then were they arrested. No where in the record, in the government's brief, or otherwise, is there any evidence, or even statements, that the Greyhound bus lines, the only interstate common carrier which could be involved, discriminated against these defendants in any manner whatsoever.

Furthermore, not one of these defendants was

a passenger in interstate commerce. The government, in its brief, refers to the words "any particular person" as used in the act and concludes that the act covered all persons who might enter the station of an Interstate Commerce Carrier for whatever purpose and regardless of the fact that they were not passengers in interstate commerce. However, the term "any particular person" as used in the Interstate Commerce Act (an act regulating interstate traffic) must obviously refer to the other words in the act, "or description of traffic". That this is true is shown by the use of the disjunctive "or" before "description of traffic". In other words, the word "traffic" relates back and applies to all of the preceding words including the word "description" as well as the word "person". Furthermore, although there is no evidence in the record either way, as a matter of fact, the restaurant, or lunch counter, portion of the building in which these demonstrations took place, is not owned by the interstate commerce carrier, Greyhound bus lines. That portion of the building, the restaurant, is leased to a different corporation which is not under the control or direction of the interstate commerce carrier.

The only case cited by the government in support of this contention is the case of *Boynton v. Virginia*, 364 U.S. 454 which is not applicable to the Briscoe case because it involved a person traveling in interstate commerce, whereas these persons were not so doing; and it did not involve persons engaged in unlawful demonstrations on private property as is the case here. We respectfully submit that the dissent in

the Boynton case by Mr. Justice Whitaker, with whom Mr. Justice Clark joined, was not only correct, but is particularly applicable to the Briscoe case. As Mr. Justice Whitaker said, ". . . . there is no evidence even tending to show that the restaurant was operated or controlled by any carrier, directly or indirectly." And further on in the dissent, it was said "to me, it seems, that Congress, in Section 203 (a) (19), hardly meant to include a private restaurant neither owned, operated or controlled by a carrier." We would further submit that neither was it intended to apply to persons not traveling in interstate commerce as Congressional jurisdiction is obtained only through the Interstate Commerce Clause of the Constitution, and only over persons either engaged in interstate commerce or traveling in interstate commerce. In fact, as noted above, the language of the statute itself excludes persons not traveling in interstate commerce. Furthermore, we also respectfully submit, in line with the dissent, that the act was never intended to apply to persons engaged in unlawful demonstrations on private property regardless of whether in interstate commerce or not.

As the committee of the Bill of Rights of the Association of the Bar of the City of New York has seen fit to file a Brief, Amicus Curiae, in these cases we would discuss briefly the one contention raised therein, that these arrests and convictions constitute state action which is prohibited by the Fourteenth

Amendment. As will be seen from their "motion for leave to file brief amicus curiae," commencing on page 1 of their brief, their brief is submitted solely in support of the proposition that these cases amount to state action to enforce private discrimination and they rely almost entirely on the rule laid down in *Shelly v. Kraemer*, 334, U.S. 1 in support of this argument. We declined to consent to the filing of the brief for the reason that this particular point had been adequately covered by the defendants, as set forth in the rules of this Honorable Court, and we still oppose the filing of this Brief Amicus Curiae on that ground. However, because of one statement made on page 7 of their brief, we will discuss their argument briefly. In the last paragraph on page 7 of their brief, they make the following statement:

> "Reversal of the conviction will leave the private parties to the dispute over segregation at the lunch counters to work out a resolution of their differences by lawful means of persuasion and pressure, while affirmance would result in continued reliance upon police and court action to perpetuate discrimination in places open to the public."

Nothing could be farther from the truth. In fact, the exact opposite of that statement would actually hold true. If these decisions are affirmed, the private parties to the dispute over segregation at the lunch counters may then work out a resolution of their differences by lawful means of persuasion as that phrase is usually contemplated. Then, and only then,

can the "private parties" get together to discuss their differences in a peaceful manner "across the table" and attempt to resolve their differences. The term "persuasion" usually contemplates peaceful argument and discussion and a convincing thereby of one person to accede to the request of the other. Such is not the method that these defendants have utilized so far. And furthermore, if these decisions are reversed, it can be logically expected that these defendants, and others similarly situated, will once again commence this unlawful harassment of private business establishments and will perhaps, under the cloak of such decision, speed up and increase their already well organized and militant program of harassing demonstrations on the private property of other individuals. *In the interest of better relations between the races; in the interest of reasonableness, peacefulness and courteousness; in the interest of the rights of all parties concerned—the shop owner, the demonstrator, the general public; the instant cases must be affirmed.*

In relying upon the Shelly case, the Committee ignores one very important factual difference between it and the case at bar. The Shelly case involves court enforcement of private covenants established by one private property owner on his property so as to affect other individuals in the future, long after the original owner had passed out of the picture. Specifically, in the Shelly case, you had two individuals, one who had agreed to buy and one who had *agreed to sell*, who are being prevented from carry-

ing out their voluntary agreement by a third person who no longer had any connection with the property involved. And although the court held illegal the issuance of an injunction to prevent the completion of the voluntary sale, it reaffirmed the principle of law that has never been changed by any case that,

> "that amendment erects no shield against merely private conduct, however discriminatory or wrongful. We conclude, therefore, that the restrictive agreement standing alone can not be regarded as violative of any right guaranteed to petitioners by the Fourteenth Amendment. . . ."

In the cases before the court we have no voluntary or willing agreement between a buyer on the one hand and a seller on the other. To the contrary, we have an owner of merchandise, who does not wish to sell, or does not wish to sell a part of his merchandise, to these alleged willing buyers. Not even a strained interpretation of the *Shelly case* could stand for the proposition that one individual who wants to buy can compel the seller to sell regardless of his desire not to sell.

The Committee then relies on the case of *Marsh v. Alabama*, 326 U.S. 501, discussed heretofore, in support of their request that this Court declare all private property, or at least all private property on which a business is being conducted, to be so public in nature that the private owner thereof cannot refuse admission thereto, or service therefrom, to anyone he chooses, for whatever reason he chooses. I can

only conclude from their brief, that they would have such ruling apply to all businesses, regardless of how large or how small, including the corner drug store, the corner grocery store, the man with the hot tamale cart, and the child selling lemonade at two cents a glass. Not only is such a contention not supported by the Constitution or the prior jurisprudence of this Honorable Court, but such a ruling is in itself inherently dangerous. It would subject private business to public regulation by any and all public agencies whether State, Local, or Federal, in all phases of its affairs, and to an extent that was never contemplated by the founders of our Nation! Such a ruling would put all private business, regardless of how large or small, in the same position as public utilities and subject them to complete governmental control which is the exact opposite of what our system of government and our system of economy stand for.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the court below should be affirmed.

SARGENT PITCHER, JR.
District Attorney
19th Judicial District
Baton Rouge, Louisiana

JOHN F. WARD, JR.
Assistant District Attorney
19th Judicial District
Baton Rouge, Louisiana

JACK P. F. GREMILLION
Attorney General
State of Louisiana
Baton Rouge, Louisiana

N. CLEBURN DALTON
Assistant Attorney General
State of Louisiana
Baton Rouge, Louisiana
Attorneys for Respondent

PROOF OF SERVICE

I, John F. Ward, Jr., one of the Attorneys for the State of Louisiana, respondent herein, certify that on the_____day of October, 1961, I served copies of the foregoing Brief of the State of Louisiana, by mailing the required number of copies, postage prepaid, to Counsel of Record for Petitioners, at the following addresses: A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana; Johnnie A. Jones, 530 South 13th Street, Baton Rouge, Louisiana; Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, New York 19, New York; Solicitor General, Department of Justice, Washington 25, D.C., and William A. Delano, 42 West 44th Street, New York 36, New York.

JOHN F. WARD, JR.
Counsel of Record
for Respondent

Sworn to and subscribed before me, the undersigned Notary Public, within and for the Parish of East Baton Rouge, State of Louisiana, this_____day of October, 1961.

NOTARY PUBLIC

2601-B, 10-61